**THE ATTORNEY GENERAL OF HONG KONG**

**v.**

**LORRAIN ESME OSMAN & 2 ORS.**

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING SUMMONS NO. R1-24-58-1991]
22 FEBRUARY 1993

***EVIDENCE: Application to call witness in evidence gathering exercise - Proposed witness former solicitor of first respondent - Witness required to give evidence pertaining to transactions occuring at the behest of the first respondent - Whether witness can be required to give evidence - Consideration of s. 126 Evidence Act 1950.***

The applicant applied to call a partner of a firm of solicitors, who acted on behalf of the first respondent, to give evidence pertaining to the several transactions occuring in his firm at the behest of the first respondent.

The first respondent objected to the calling of this witness on the grounds that the matters he would give in evidence relate to client-solicitor relationship and would breach the confidence the client had reposed in his solicitor and rob the witness of the protection he has under s. 126 of the Evidence Act 1950 (the Act).

The question that arose was whether the applicant had succeded in bringing himself within the proviso to s. 126 of the Act namely that the communications were made in furtherance of an illegal purpose.

**Held:**

**[1]** There was no merit in the argument of Counsel for the first respondent that the offence of corruption was completed in Hong Kong and that the transfer of the funds to the solicitors in Malaysia was subsequent to the commission of the offence. There was ample evidence, including the decision of the Divisional Court in the United Kingdom, to find *prima facie* that corruption had been made out and that the commission of the offence occured over a period of time from 1981 to 1983.

**[2]** The sending of huge sums of money of over RM5 million and then dispersing the sums on a variety of transactions could only lead to the conclusion that it was an act or acts of laundering and therefore communications made in furtherance of an illegal purpose under proviso (a) of s. 126 of the Act.

**[3]** Although the order of disclosure must be sparingly given, since the applicant was able to establish a strong *prima facie* case, they were entitled to the disclosure sought.

*[Solicitor concerned ordered to give evidence of whatever transactions occured between his firm and the first respondent and it was further ordered that all solicitor and client communication cease to be confidential].*

**Cases referred to:**

*Regina v. Governor of Pentoville Prison, ex parte Osman [1990] 1 WLR 277* ***(refd)***

*Derby & Co. Ltd. and Ors. v. Weldon and Others (No. 7) [1990] 3 All ER 161* ***(cit)***

*Baker v. Campbell [1983] 153 CLR 52* ***(cit)***

**Legislation referred to:**

Evidence Act 1950, s. 126
Rules of the High Court 1980, O. 39

*For the applicant - Graham Campbell Grant (Ira Biswas with him); M/s. Chooi & Co.*
*For the first respondent - Anad Krishnan; M/s. Anad & Associates*
*For the third respondent - Graeme Hamilton, Q.C. (Teh Boon Eng with him); M/s. Teh & Associates*

**JUDGMENT**

**Hj. Abu Mansor bin Ali J:**

Mr. Grant, on behalf of the Hon. Attorney-General Hong Kong, in this evidence gathering exercise before me, applies to call a witness Mr. Narayanan, an advocate and solicitor, a partner in the firm Ng Ek Tiong & Partners. The matter he would give evidence pertaining to the several transactions occurring in his firm at the behest of the firm's client Mr. Lorrain Esme Osman, the first respondent named before me.

Mr. Krishnan on behalf of Lorrain Esme Osman objects to this witness being called on the ground that the matters he would give in evidence relate to client-solicitor relationship and will breach the confidence his client has reposed in his solicitor and rob the witness of the protection he has under s. 126 of the Evidence Act 1950:

> 126. (1) No advocate shall at any time be permitted, unless with his client's express

consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure -

(a) any such communication made in furtherance of any illegal purpose;
(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

I asked Mr. Grant to begin, as clearly the calling of the witness will only be permitted if he could bring the matters within the exception i.e. the proviso of the above section.

Mr. Grant began by informing the Court that the would be witness was already called to give the same evidence before Harun J. (as he then was) in 1986. At that evidence taking conducted for the purpose of another proceeding the respondent through his then Counsel raised the same objection that the evidence to be given was covered by legal professional privilege and therefore the evidence could not in any circumstances be given. Harun J overruled the objection and held that the matters to be given was covered by the proviso to s. 126 of the Evidence Act. The witness gave evidence.

Mr. Grant argued that since this matter had that history as related the respondent therefore is not entitled to object as the principle of *res judicata* would apply and the respondent's objection would be tantamount to abusing the process of the Court since the question had finally ended with Harun J's order that he was allowing the evidence to be given.

Mr. Krishnan in reply argued that *res judicata* applies only in civil cases and not in criminal cases. He cited several authorities on the point and I am of the view that there is merit in his argument that *res judicata* comes into play only in civil cases and not in criminal cases. The only instance, if it all it applies, is when the principle of *autre fois acquit* and *autre fois convict* applies.

I considered that the matter of the calling of this witness comes squarely, whether Mr. Grant can come within the provisos to s. 126 of the Evidence Act. It is clear to me that it is common ground to both parties that the calling of Mr. Narayanan is, by the authorities cited by both sides, clearly prohibited by s. 126 of the Evidence Act unless Mr. Grant can bring himself within the proviso of the Act.

Mr. Grant's position was that the Attorney-General Hong Kong comes within the proviso and therefore is entitled to call this witness. Mr. Grant says this witness is a necessary witness as he fills in the required details how the corrupt money, to be adduced by the Attorney-General Hong Kong, appeared and on whose instructions its disbursements was ordered or was undertaken.

It is the intention of the Attorney-General to prove in Hong Kong that the defendant Lorrain is guilty of having agreed to accept corrupt money from the Carrian Group represented by George Tan, the third respondent. Then some portion of such money about RM5 million was transmitted by Lorrain to his solicitors Ng Ek Tiong & Partners.

Mr. Grant submitted that he has to satisfy the Court according to arm (a) of the proviso to s. 126 of the Act that such communication was made in furtherance of any illegal purpose. He cited and the crown relies on the evidence already found by the Chief Magistrate in London in the case of Lorrain in *Regina v. Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277. The detailed judgment of the Chief Magistrate went up for a review by the Divisional Court and His Lordship of the Divisional Court confirmed the learned Chief Magistrate's finding of fact and law. This includes the finding of the Chief Magistrate on the 6 charges of corruption we are concerned with.

I find merit in the argument of Mr. Grant that this Court has but to respect the decision of the Chief Magistrate and the Divisional Court in England that on the evidence before them and before me there is ample evidence for me to find *prima facie* that corruption has been made out.

As has been submitted by Mr. Grant this Court has the benefit of Harun J's decision in 1986 on the same pieces of transaction that the communication was for a illegal purpose, the purpose of which was to put the sums obtained in various transactions out of reach of the real owner of it.

In support of this application Mr. Grant cited *Derby & Co. Ltd. and Others v. Weldon and Others (No. 7)* [1990] 3 All ER 161 where the plaintiff therein embarked on an action against the defendant's alleging deceit, conspiracy to defraud and seeking delivery of secret profits. A question of legal professional privilege was raised and the Court held:

> Where communications which would otherwise be within the protection of legal professional privilege had been made in furtherance of a fraudulent design, a person was not entitled to assert legal professional privilege as a ground for refusing to disclose those communications in circumstances where the party seeking disclosure was able to establish a strong *prima facie* case of fraud.

Mr. Krishnan on the other hand contended that the Attorney-General Hong Kong cannot bring himself within the proviso of s. 126. He argued that it is incumbent on the Attorney-General Hong Kong in order to come within either proviso (a) or (b) of s. 126 of the Act to show that the engagement of the solicitor occurred before the offence was committed. He argued further that according to the evidence and facts of the case as given by the prosecution in the London proceedings the offence was committed first in Hong Kong and then Lorrain engaged or transacted with the solicitors in Malaysia after the offence. He argued that if the offence is already completed in Hong Kong, Lorrain's communication with his solicitors in Malaysia could not be in furtherance of any illegal purpose. In particular each charge brought against Lorrain had to be separately proved having been committed in Hong Kong and therefore payment or remittance of such money to Malaysia cannot be said to be in furtherance of any illegal purpose. He further argued if the money found its way into a solicitor's account and then dispersed; all that part involving the solicitors and those transactions must be privileged communications. In support he cited the Oxford dictionary meaning of "furtherance" - there must be some evidence that the solicitors were furthering an illegal purpose.

In this evidence recording it is clear under O. 39 of the Rules of the High Court, 1980 the examiner does not concern himself with the admissibility of the evidence. That is for the trial Judge. It has been submitted and it appears, however, the issue of legal professional privilege concerns the production of evidence rather than that of admissibility. I am asked by the parties to make a ruling here for the production of the sought for evidence if circumstances warrants its production.

On the authorities cited before me I am clear, I have to decide according to the facts of each case. After having considered this issue and after considering the authorities and the facts before me, in particular the submission of counsel for A.G. Hong Kong, that the commission of the alleged corruption was over a period of years which started in 1981 going through to 1983, in the event there is none of the so-called completed offence or completed transactions.

I therefore found no merit in the argument of Mr. Krishnan that the offence of corruption was completed in Hong Kong and the transfer of the funds to solicitors in Malaysia was after that. I find the putting of events into such compartments is like putting blinkers over our eyes. Subject to what the trial Court is going to say, with the benefit of the transcript of the evidence before Harun J, I cannot escape the conclusion that the sending of such huge sums of RM5 over million to Malaysia and then dispersing the sums on a variety of transactions can only be an act or acts of laundering as described by Mr. Grant and therefore communications made in furtherance of illegal purpose, under proviso (a) of s. 126 of the Evidence Act, 1950.

I am persuaded by the above cited case of *Derby and Co. Ltd. & Ors. v. Weldon and Ors. (No. 7)* which also held, *inter alia*, that although the order of disclosure must be sparingly given, nevertheless, since the creation of the trusts and the transfer of the assets to them, were steps taken in furtherance of the initial fraud alleged, in the sense that they were taken to conceal or render irrecoverable profits made by LMFE, the plaintiffs had asserted a proprietary claim, the plaintiffs were able to establish a strong *prima facie* case of fraud and as a result were entitled to the disclosure sought.

In this decision I am also persuaded by the judgment in *Baker v. Campbell* [1983] 153 CLR 52 (Australia) where Deane J. held:

> The privilege does not extend to protect communications which are in themselves part of a criminal or fraudulent proceeding or course of conduct or which constitute the whole or part of an actual dealing or transaction (see O'Reilly's case). Nor does it extend to protect things lodged with a legal adviser for the purpose of obtaining immunity from production.

Fortified by the authorities cited above and in the public interest I duly order that Mr. Narayanan do take the stand to give evidence of whatever transactions that occurred between Lorrain and his firm and whatever solicitor and client communication will cease to be confidential. In so ordering I make no imputation that the firm of Ng Ek Tiong & Co. was in anyway implicated; in carrying out the client's instruction the firm may well be blameless.